No. 83-968

IN THE

Supreme Court of the United States

October Term, 1983

CHARLES STORNIOLO,

Petitioner,

vs.

GINA KAREN FISHING, INC., a Corporation; PACECO, INC., a Corporation; ARTHUR DEFEVER, an Individual; ARTHUR DEFEVER, INC., a Corporation; MORRIS GURALNICK ASSOCIATES, INC., a Corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN OPPOSITION.

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BRIEF IN OPPOSITION.

Statement of the Case.

Storniolo brought this action for personal injuries against Gina Karen Fishing, Inc., owner of the tuna boat GINA KAREN, under the Jones Act and general maritime law. Storniolo claimed he fell down the engine room ladder while the vessel was tied to the dock in San Diego Harbor on August 16, 1977. Storniolo also sued Paceco, Inc., Arthur DeFever, Arthur DeFever, Inc., and Morris Guralnick Associates, Inc., the builders and designers of the vessel and the ladder for negligence and products liability.

The jury returned a verdict in favor of all defendants, with a special finding that Storniolo was 100% contributorily negligent. This conclusion was reached after a great deal of evidence was submitted by all sides — not only that the

ladder was perfectly safe in design and construction, and in maintenance on the day of the accident, but also that the only explanation for plaintiff's accident was his own carelessness.

As to design and construction, GINA KAREN called Pasquale LoCoco, a part owner of the vessel and an experienced, licensed Chief Engineer. He testified that he had served on the GINA KAREN continuously since its launching in 1969 and that to his knowledge the ladder had been traversed each year a minimum of approximately 12,000 times under both calm and adverse weather conditions, with *no* accidents occurring. R.T. 962-65. LoCoco testified it was his opinion the ladder was safe and reasonably fit to use on the day of the accident, R.T. 967, and as a part owner and as the person who used the ladder the most, if it had not been safe he would have changed it. R.T. 1046-47. GINA KAREN also called Captain Brian Smith, a marine surveyor with 19 years experience in surveying tuna boats, such as, the GINA KAREN. He testified he had surveyed the vessel and her ladder after each and every one of her fishing trips, R.T. 813, and, based on his experience, found it perfectly safe, and not in need of any modifications to tread surface or ladder angle as suggested by Storniolo. R.T. 820-56.

Paceco, Guralnick and DeFever presented witnesses to substantiate the safety of the ladder in design and construction in a more technical way. Morris Guralnick, a graduate of M.I.T. and a naval architect and marine engineer with over 50 years of experience [R.T. 1222-23], testified that the ladder was safe as to angle and tread surface. R.T. 1229-44. Guralnick also explained why alternative tread surfaces were unsafe or at least were not as good as the present tread surface. R.T. 1244-47. Thomas Wilson, another naval architect with a Bachelor of Science degree from the U.S.

Naval Academy who, in his 28 years of experience, participated in the design of three of the world's largest warships [R.T. 1220], testified that the ladder was perfectly safe as to angle and tread surfaces. R.T. 1183-91. DeFever himself, another naval architect, testified the ladder angle was safe. R.T. 1144-45. Finally, Captain Bowman, a retired U.S. Coast Guard Captain, testified the angle of the ladder was perfectly safe. R.T. 1175.

By contrast, Storniolo managed to bring forth one "expert," Fred Cady who specializes in accident reconstruction. R.T. 384. Cady freely admitted he had no experience in matters maritime, including naval architecture or design, and had never been aboard a vessel, such as, GINA KAREN prior to being retained by Storniolo. R.T. 504-07. Although he had great difficulty qualifying to testify as to *any* opinions, R.T. 384-485, he was allowed to offer several unfounded ideas and opinions, over strenuous objection, as to why the ladder should be considered defective. As a purported basis for his conclusions, Cady testified as to certain "coefficient of friction" tests he had run on exemplars of diamond tread and other treads. R.T. 400-11. The actual steps on GINA KAREN were of diamond tread composition and painted with a blue deck paint. Cady admitted he had not run any tests on the actual steps. R.T. 511-13.

Solely to refute the conclusions of Mr. Cady, as opposed to legitimizing Cady's "qualifications" as an expert, GINA KAREN called registered safety engineer [R.T. 1055] Ron Doss, a veteran of many accident investigations aboard tuna vessels. R.T. 1055-56. Doss testified he had run coefficient of friction tests similar to those run by Cady, except that Doss had performed his tests on the actual step surfaces, R.T. 1061, and had used actual tennis shoes, R.T. 1059-61, similar to those worn by Storniolo in order to better simulate the dynamics of the actual accident. Cady used

little rubber patches. On the basis of his experience, safety standards in the field, and his own tests, Doss concluded and testified that the ladder was safe in all respects, including tractive quality. R.T. 1072-73.

Importantly, Doss testified that even using Cady's figure for the coefficient of friction of his "exemplar," Doss would not change his opinion as to the safety and tractive quality of the ladder. R.T. 1073. Both Cady and Doss testified the higher the coefficient, the better the tractive quality. Cady had found a .46 coefficient of friction for his exemplar's painted diamond tread [R.T. 410], while Doss found coefficients of friction in the range of .56 to .68 in his tests on the actual painted treads. R.T. 1062-64. Doss pointed out that the coefficient of friction is .2 to .25 for a dance floor, .35 to .4 for the average grocery store floor, and .45 to .65 for sidewalks and roadways. R.T. 1067. Also, the National Bureau of Standards in 1941 published a set of standards which indicated that anything above a .4 coefficient for rubber soles is classified as "good" tractive quality. R.T. 1067-68. Thus, Doss testified that Cady's coefficient of .46 was a good figure for this tread surface and application.

As to the maintenance of the ladder on the day of the accident, the record is absolutely devoid of any evidence of a foreign substance on the steps which caused Storniolo to fall. Storniolo himself admitted he saw no grease or oil. R.T. 219. LoCoco denied seeing any grease or oil on the steps, despite traversing them several times that morning before Storniolo came aboard. R.T. 944. Nor did he see any grease or oil on the steps right after the accident, despite traversing them again to summon help. R.T. 948-49. The two police officers/paramedics, Officers Rundberg and Sergott, who rendered aid to Storniolo, denied seeing any grease or oil, despite thoroughly checking for it on the ladder steps. R.T. 746-47, 772-73. The officers were looking for oil and

grease not only because Storniolo said he had slipped on the steps, R.T. 774, but also because they wanted to keep their gurneys and uniforms clean, R.T. 749-50, 775, and because they wanted to avoid slipping while attempting to remove Storniolo. R.T. 750, 776-77. Officer Rundberg testified that he even examined the soles of Storniolo's shoes to see if there was any grease or oil or other foreign substance on them, and found none. R.T. 774-76.

The best Storniolo could offer in this regard was his own testimony that he "slipped" and the testimony of a friend, Gaspare Catanzaro, that he, Catanzaro, had gone to the top of the ladder shortly after the accident, descended two or three steps, then "slipped," and returned to the top of the ladder. R.T. 644. Even Catanzaro had to admit he saw no grease or oil or any other foreign substance. R.T. 645. He also admitted he did nothing further about the fact he had slipped, such as checking to see if there was anything on the steps that caused him to slip. R.T. 645. And, even though his friend had just fallen down the ladder and others would be going up and down the ladder to get him out, Catanzaro did not bring the "slipperiness" to the attention of others.

That this accident would not have occurred but for Storniolo's own negligence and his negligence alone, cannot seriously be disputed. Storniolo consciously and deliberately chose to descend a ladder he had never seen or been on before, R.T. 219, in light his eyes were adjusting to, R.T. 235, without his prescription glasses, R.T. 235-36, carrying a wrench in his right hand instead of his pocket, R.T. 218-19, 234, facing away from the ladder, *i.e.* going down backwards, R.T. 219, 269-70, on shoes with rounded heels [Ex. A-6]. By these conscious acts of Storniolo, the prescription for disaster, unfortunately, was filled.

With an understanding of the overwhelming evidence the jury had before it in favor of defendants, the sophistry of Storniolo's attempt to overturn the verdict based on the alleged misconduct of the jury view is revealed. The jury view requested by GINA KAREN, and agreed to by Storniolo after his counsel had a chance to inspect the condition of the ladder at the time of trial, was intended to allow the jurors to see the ladder in context. After all, Storniolo had commissioned the construction of a "mock-up" ladder which was large, but "not to scale" or "representative," and had it prominently displayed in the courtroom throughout the trial. R.T. 380-82, 673-76. It was used as a "prop" in many situations and for demonstrations by counsel and witnesses to the jury [*e.g.*, R.T. 526-28]. The jury view allowed the jury to see the actual ladder in its natural setting for a short one-half hour, so that they could have more of the actual evidence with which to decide the case.

ARGUMENT.

I.

A Magistrate's Unrecorded Communications With the Jury Are Not Presumed Prejudicial.

Plaintiff claims that the magistrate's unknown comments during the jury view were prejudicial. However, after the jury view and during the trial, plaintiff made no effort to ascertain by a special hearing outside the presence of the jury what the magistrate did or said. Plaintiff could have examined the magistrate himself, any of the marshals who attended the jury view, the opposing attorneys, and/or the jurors as to their recollection of what was said and done. Instead, plaintiff elected to waive the alleged impropriety and proceed with the trial. Now following an adverse verdict, plaintiff seeks to raise the issue.

Until 1919, it was the practice that any error at trial required a reversal unless the party opposing the reversal could "affirmatively demonstrate from other parts of the record that the error was harmless." *Haywood v. United States*, 268 F. 795, 798 (7th Cir. 1920). However, by legislation that year, 40 Stat. 1181 [the harmless error rule], Congress changed the practice to require "that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial." *Haywood v. United States*, 268 F. 795, 798 (7th Cir. 1920). Citing with approval the *Haywood* analysis, this Court in *Berger v. United States*, 295 U.S. 78, 82, 55 S.Ct. 629, 631, 79 L.Ed. 1314, 1318 (1935), stated:

> "Evidently Congress intended by the amendment of §269 [the harmless error rule] to put an end to the too rigid application, sometimes made, of the rule that error being shown, *prejudice must be presumed*; and to es-

tablish the more reasonable rule that *if, upon an examination of the entire record, substantial prejudice does NOT appear, the error must be regarded as harmless.*" (Emphasis added.)

The House of Representatives' Committee Report states that the purpose of the rule was " 'to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded.' H.R. Rep. No. 913, 65th Cong. 2d Sess. 1." *Kotteakos v. United States*, 328 U.S. 750, 760, 66 S.Ct. 1239, 1246, 90 L.Ed. 1557, 1564 (1946).

The present wording of the harmless error rule continues the original purpose of the rule by requiring affirmance of all judgments *unless* there is evidence of prejudicial conduct. The statute reads:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, *unless refusal to take such action appears to the court inconsistent with substantial justice*. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." F.R.C.P. 61. (Emphasis added.)

The case relied upon by petitioner for his presumption of prejudice argument was tried by the District Court and heard by the Third Circuit Court of Appeals before the enactment of the harmless error rule in 1919 and during the period when any error was presumptively prejudicial. *Fillipon v. Albion Vein Slate Co.*, 242 F. 258 (3d Cir. 1917), *rev'd*, 250 U.S. 76, 39 S.Ct. 435, 63 L.Ed. 853 (1919). Secondly,

although the Supreme Court's *Fillipon* opinion was released within three months after congressional enactment of the harmless error rule, the Supreme Court neither cited nor discussed the new rule. Finally, and more significantly, the erroneousness and prejudicial effect of the ex parte judicial communication involved in *Fillipon* were *not* presumed because the ex parte statement was in writing and preserved for review where the Supreme Court found (not presumed) the statement to be prejudicial error. Here, unlike *Fillipon*, petitioner wants the Court to presume the unknown statements were harmful.

Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), is more analogous to this case than *Fillipon*. In *Palmer* one of plaintiff's witnesses testified on cross-examination that he had given a signed statement to one of plaintiff's lawyers. When the defendant's attorney asked to inspect the statement, the court ruled that the door would be opened by such inspection for plaintiff to offer the statement in evidence; thus, defendant declined to inspect it. The defendant contended that the ruling was reversible error. However, this Court stated:

> "We do not reach that question [namely, whether the ruling was erroneous]. Since the document was not marked for identification and is not a part of the record, *we do not know what its contents are*. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous. Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. [February 26, 1919] 40 Stat. 1181, c. 48, 28 U.S.C.A. §391. *He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of*

> *showing that prejudice resulted.* That burden has not been maintained by petitioners." 318 U.S. at 116, 63 S.Ct. at 482, 87 L.Ed. at 651. (Emphasis added.)

Although *Palmer* dealt with an unrecorded statement of a witness, the same analysis has been applied to ex parte judicial comments. *See e.g., Rogers v. United States*, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1, 6 (1975); *Dixon v. Southern Pacific Transp. Co.*, 579 F.2d 511, 513-14 (9th Cir. 1978); *Skill v. Martinez*, 677 F.2d 368, 371 (3d Cir. 1982); and *Charm Promotions, Ltd. v. Travelers Indemnity Co.*, 489 F.2d 1092, 1095-96 (7th Cir. 1973), *cert. denied*, 416 U.S. 986, 94 S.Ct. 2390, 40 L.Ed.2d 763 (1974) (Certiorari denied in similar case where the Seventh Circuit stated: "We hold that a trial judge's ex parte communication with the jury after it has begun its deliberations is not per se reversible error, but is controlled by F.R. Civ. P. 61." 489 F.2d at 1096).

This standard conforms to common sense. If all ex parte communications were "presumed" prejudicial, then mere pleasantries shared by the judge with a jury in the courthouse cafeteria or elevator would be deemed reversible error. Also, if all ex parte communications were "presumed" prejudicial, how could the court determine which side was prejudiced by the communication? This case is a good example. It is just as likely here that ex parte comments by the magistrate prejudiced the defendants as the plaintiff. In fact, immediately upon returning to the courthouse after the jury view, plaintiff's counsel in his comments to the court admitted that he did not know if the magistrate's conduct prejudiced his case:

> "I don't know what he said. I'm not sure what all went on. I now, in retrospect, wish I did take the court reporter. That is my fault, not yours. I guess, for the record, I should move for a mistrial, on the grounds

> that evidence has been taken out of the presence of the court by the jury. I don't know that it's—the problem is I don't know if it's prejudicial." [R.T. 806]

At another point, referring to the comments of the magistrate, petitioner's counsel said, "It swings both ways, in terms of the plaintiff and the defense." R.T. 869. Consequently, although petitioner himself does not know who, if anyone, was prejudiced by the alleged remarks, he wants this Court to presume he was prejudiced solely because he lost the trial.

II.

Petitioner Concedes, as Both the District Court and the Court of Appeals Have Found, That He Waived Any Misconduct.

Petitioner concedes that he waived the presence of a reporter at the viewing, Petitioner's Brief for Certiorari at 28-29, and for the first time now concedes that he also abandoned his motion for a mistrial based on alleged misconduct. Petitioner's Brief for Certiorari at 30. Instead, petitioner contends that he waived his mistrial motion in exchange for an admonishment, but the admonishment given, he contends, was insufficient. Petitioner's Brief for Certiorari at 30.

However, if the admonishment was insufficient, petitioner has waived that also, in that:

First, petitioner's counsel did not submit his requested instruction in writing. *See* Federal Rules of Civil Procedure, Rule 51; 9 C. Wright & A. Miller, *Federal Practice and Procedure*, §2552 at 624 (1971).

Second, the court and petitioner's counsel discussed the instruction *and agreed upon* its exact wording two days before it was given. R.T. 869, 1280-83, 1789.

Third, petitioner did not object to the instruction after it was given and before the jury retired as required by the pertinent part of Rule 51 of the Federal Rules of Civil Procedure: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Fourth, after the instructions were given, plaintiff affirmatively stated for the record that he had no objections. R.T. 1818.

Since plaintiff failed to submit a different instruction, failed to object to the instruction when proposed and as given, and failed to object before the jury retired to deliberate, he may not now complain of error in the instruction. *Palmer v. Hoffman*, 318 U.S. 109, 119, 63 S.Ct. 477, 483, 87 L.Ed. 645, 653 (1943); *Mill Owners Mutual Fire Ins. Co. v. Kelley*, 141 F.2d 763, 765-66 (8th Cir. 1944); and numerous other cases.

Finally, in desperation, petitioner contends that no objection to the alleged misconduct was necessary. Petitioner relies upon Rule 605 of the Federal Rules of Evidence:

> "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."

Petitioner contends that since the magistrate was acting as the judge during the jury view no objection to the magistrate's conduct was necessary. However, this ignores the rationale for the Rule. The Advisory Committee's Note states:

> "The rule provides an 'automatic' objection. To require an actual objection would confront the opponent with the choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price

of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector."

Here, the trial was being conducted by Judge Keep; accordingly, by objecting to Judge Keep about the magistrate's conduct, petitioner did not run the risk of "continuing the trial before a judge likely to feel that [her] integrity had been attacked by the objection." Moreover, petitioner obviously did not feel any reluctance to object because he moved for a mistrial immediately upon return to the courthouse from the jury view. R.T. 805-06.[1]

Here, petitioner not only objected but also discussed the point at length with the court. In other words, Rule 605 is inapplicable not only because the purpose for the rule is not in issue (namely, by objecting petitioner did not have to attack the integrity of the judge), but also because petitioner did not fail to object but instead discussed the issue with the court and affirmatively *waived* the alleged error in favor of an admonition and the continuance of the trial. Remember, no defense evidence had been presented up to that point. Petitioner made a tactical decision to continue the trial and he should not now be permitted to complain.

Conclusion.

In determining whether an error is prejudicial, the entire record must be considered and the probable effect of the error determined in the light of all the evidence. *Kotteakos v. United States*, 328 U.S. 750, 762, 66 S.Ct. 1239, 1246, 90 L.Ed. 1557, 1565 (1946); 11 C. Wright & A. Miller, *Federal Practice and Procedure*, §2883 at 278 (1973). In

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[1]Contrary to the implication in petitioner's brief, *Kennedy v. Great Atlantic & Pacific Tea Co.*, 551 F.2d 593 (5th Cir. 1977), does not support his contention that no objection is necessary. As the opinion shows, the complaining party there did object to the judge's law clerk being permitted to testify. *Id.* at 598-99.

ruling upon petitioner's motion for a new trial, the district court weighed the evidence as a whole and stated:

> "I would point out that neither negligence nor unseaworthiness were proved by a preponderance of the evidence. There is no substantial evidence in the record that there was anything, oil or water, on the steps, and defendant indeed put on evidence, the testimony of the two police officers, and Mr. LoCoco, to say that there was no grease or any other foreign substance on the ladder on the day the accident took place.
>
> Plaintiff did put on a mechanical engineer who felt basically that there was insufficient heel room on the ladder that caused the accident and made that evaluation both from the surface of the steps and the angle of the steps, and the width of them, and also including the tread. However, in this particular case defendants put on several experts who testified that the design of the ladder satisfied the standard of care, and this was in view of heel space, angle, surface material, etc.
>
> [Furthermore] there is no substantial evidence that any lack of maintenance contributed to the accident in this case." R.T. 1854.

The entire transcript reflects overwhelming evidence in support of the jury verdict with virtually no evidence supporting petitioner's case.

Secondly, there is no evidence that the magistrate committed any error during the jury view. Although petitioner states that the magistrate did not read the prepared statement, petitioner's counsel at the trial admitted that the statement was "ad libbed." R.T. 805. Counsel also stated on the same day as the jury view that, "I know he [the magistrate] did nothing intentionally malicious to anybody for any reason, but I am concerned that he [the magistrate] may have made statements." R.T. 805. In short, there is no evidence the magistrate said something erroneous.

Third, there is no evidence that any error, if committed, was prejudicial to petitioner. In fact, petitioner's counsel during the trial on the same day as the jury view stated, "I guess, for the record, I should move for a mistrial, on the grounds that evidence has been taken out of the presence of the court by the jury. I don't know that it's—*the problem is I don't know if it's prejudicial.*" R.T. 806.

Fourth, petitioner withdrew his motion for a mistrial saying, "Que sera, sera, what will be, will be. Let's go forward. I withdraw my motion for a mistrial on the record." R.T. 868.

Fifth, petitioner then sought an admonishment to be given as part of the jury instructions, R.T. 868-69; and after the wording was discussed, petitioner agreed to the instruction before it was given, R.T. 869, 1280-83, and did not object to it after it was given. R.T. 1818.

In summary, the evidence supporting the verdict is overwhelming and as the trial court stated in ruling upon petitioner's new trial motion:

> "After the trip to the boat, Mr. Harrison (petitioner's attorney) did demand a mistrial . . . . [Later] the plaintiff's counsel stated, 'Que sera, sera; what will be, will be. Let's go forward. I withdraw my motion for a mistrial on the record.' So there was no further inquiry or steps taken at that time to determine what, if anything, was said by the magistrate as it might have had a bearing on the facts of this particular case . . . . The withdrawal of the motion for new trial is an indication of plaintiff's estimate of the prejudicial value of the conduct, and therefore a significant factor in the appraisal of the degree to which the proceedings deviated from the standards of justice . . . . In sum, as to the allegations of the magistrate's misconduct, under *Dixon*, the plaintiff has failed to show how the improper com-

> munications affected the substantial rights of the parties. First, it is speculative as to what was stated and what effect it had, if any, on the jurors' determination. Secondly, any misconduct, were there any, was waived . . . ; and, third, assuming that there was some misconduct, I do find that it was cured by the instruction that was given." R.T. 1847-48.

The Ninth Circuit agreed and petitioner's brief contains nothing this Court has not ruled upon in the past.

Dated: January 12, 1984.

Respectfully submitted,

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